IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12164 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?No

2 To be referred to the Reporter or not ?No

3 Whether their Lordships wish to see the fair copy of the judgment ?No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?No

5 Whether it is to be circulated to the civil judge ?No

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JAGJIT TRANSPORT COMPANY - Petitioner(s)
Versus
INDIAN OIL CORPORATION LTD - Respondent(s)

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Appearance :
MR DP KINARIWALA for Petitioner(s) : 1,
MR MANISH R BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 27/06/2006

ORAL JUDGMENT

1. Rule. Mr.Manish R.Bhatt,learned advocate appears and waives service of notice of Rule on behalf of respondent-Indian Oil Corporation

Limited.

2. Since the issue involved in this petition is in narrow campass, and with respect to interpretation of Clause 16-a of Bulk Pol Road Transport Agreement dated 20th December, 1999, entered into between the parties. With the consent of learned advocates appearing for the parties, the matter has been taken up for final hearing today and decided by this order.

3. By filing instant petition under Article 227 of the Constitution, the petitioner seeks to challenge the order dated 17.3.2006 recorded below application Exh.9 (summons for judgement) and Exh.12 seeking unconditional leave to defend the suit in Summary Suit No.1717 of 2003 by the learned Chamber Judge, Court No.14, City Civil Court, Ahmedabad, by which the application filed by the petitioner (`defendant' for short) seeking unconditional leave to defend the suit came to be rejected and defendant is permitted to defend the suit on condition of depositing Rs.2,70,000/- in the court within six weeks from the date of the order. The order further stipulates the defendant to file written statement and thereafter the suit shall be transferred to the list of long causes file.

4. The respondent (`plaintiff' for short) filed a suit for an amount of Rs.13,84,679/- under the

provisions of Order 37 of the Code of Civil Procedure. The said suit was registered as Summary Suit No.1717 of 2003. In the said suit it was contended that the plaintiff issued a tender inviting offers from transporters interested in the transportation job of the plaintiff. It was further contended that the tender of the defendant was accepted in the year 1986 and it was awarded contract. It was further contended that the contract and agreement was entered into between the plaintiff and the defendant. The said agreement was also extended upto 31.8.2002. As per the terms and conditions of the contract, the tanker was to be provided by the defendant for transporting the petroleum products and the tanker along with the driver were required to carry the petroleum products from particular storage point of plaintiff to the plaintiff's customers/other storage points as instructed by the plaintiff from time to time.

5. The agreement further stipulated that it is the responsibility of the defendant's carriers to deliver the quality and quantity of the products received by it for transportation. It was further contended that Western Railway being a customer of the plaintiff, certain consignments were sent by the plaintiff to be delivered to the Western Railway through the defendant carrier. On 31.7.2002, a letter was

received from the Senior Section Engineer (Diesel), Western Railway, Sabarmati addressed to the Senior Terminal Engineer, Sabarmati Terminal of the plaintiff informing about the monthly loading programme of HSD for August 2002 for RCD,Sabarmati and along with the plaintiff dispatched the required quantity of HSD to the defendant carrier to be delivered through RCD Sabarmati. The plaintiff received a letter dated 19.8.2002 from the Western Railway, Sabarmati, that as per the revised loading programme, three loads were required for RCD Sabarmati on 17.8.2002, but only two loads have been received by them on 17.8.2002 and, therefore, a joint conciliation of stock at RCD, Sabarmati was carried out on the same day and it was found that five tanker trucks belonging to the defendant carrier loaded with HSD Terminal had not reached to the Western Railway, Sabarmati. When the signature of stamp on the concerned challans were shown to the Western Railway, the plaintiff was informed that the signature and stamp on the concerned challans were fake and goods supplied by the plaintiff against those challans had never reached to the RCD Western Railway, Sabarmati. The said fact was brought to the notice to the defendant vide letter dated 21.8.2002 and the defendant was called upon to make payment of Rs.12,25,860/-, and since the defendant did not respond, again letters were issued on 6.11.2002 and 20.11.2002.

It was further contended that the letter dated 20.11.2002 was replied on 23.11.2002 by the defendant and it was contended by the defendant that the case of non-delivery was undisputed case of conspiracy between driver and the conductor. A criminal complaint was lodged before the Sabarmati Police Station, and after that the suit was filed on the ground that, as per Clause 10(c) and (f) of the agreement, the defendant was under obligation to ensure correct delivery documents and has to obtain signature of recipient on the delivery documents. In the suit, it was contended that, as per Clause 9(a) and (b), the defendant's carrier is responsible for quality and quantity of the products received by him for transportation, and any shortage in quantity as also for any shortage and/or variation in quality products, since the responsibility of the defendant's carrier is absolute as per Clause 9(i), the plaintiff is entitled to effect recovery as stipulated therein. The plaintiff has also taken out summons for judgment. After serving of the summons, the defendant had appeared and had filed leave to defend application wherein it was inter-alia contended that the suit is based on allegation that the defendant had prepared fake and fraudulent delivery challans, therefore it was contended in the leave to defend application that whether those delivery challans were fake or fabricated or fraudulent

is a disputed question of fact, and on the basis of application, this cannot be decided.

6. It was also contended that, by virtue of clause 16(a) of the agreement, any dispute or difference that arises between the parties, the same shall be referred to the sole arbitrator nominated by the plaintiff's company and, therefore, it was prayed to grant the unconditional leave. The learned trial Judge, after hearing the learned advocates appearing for the parties, came to the conclusion that the defendant failed to make out the case to grant unconditional leave, and therefore he rejected the application seeking unconditional leave and directed the defendant to deposit Rs.2,70,000/- within six weeks, which has given rise to the present petition.

7. Mr.D.P.Kinariwala, learned advocate of the petitioner has invited my attention to Clause 16(a) of the Agreement dated 20.12.1999, and contended that any dispute or difference of any nature whatsoever including claims, cross-claims, counterclaims or set-offs arising out of or in relation to Agreement shall be referred to the sole arbitration of the Head of of the concerned Regional/Zonal/Area Office of the Company or any official of the Company nominated by such Head of the Region/Zone/Area of the Company. He, therefore, contended that by virtue

of Clause 16(a) of the agreement, the learned trial Judge ought to have referred the dispute to the arbitrator in stead of deciding the said issue. He, therefore, urged that the impugned order deserves to be quashed and set aside by allowing this petition, since the learned trial Judge has committed jurisdictional error and the jurisdictional error can be corrected in a petition filed under Article 227 of the Constitution.

8. Mr.Manish Bhatt, learned advocate of the respondent, contended that there is no error in passing the impugned order, as the defendant has failed to make out the case. The defence raised by the defendant is not genuine, they are moonshine and fabricated. However, he conceded that in view of Clause 16(a) of the Arbitration Agreement, at the first instance the learned trial Judge ought to have referred the dispute to the arbitrator. He, therefore, urged to pass appropriate order.

9. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned order as well as the statutory provisions contained under the Arbitration & Conciliation Act, 1996, (`the Act' for short) and the reported decision of the Supreme Court in the case of **Hindustan Petroleum Corporation Limited Vs. M/s.Pinkcity Midway**

Petroleums reported in AIR 2003 SC 2881.

10. In the case of Hindustan Petroleum Corporation Ltd., (supra), the Supreme Court has held that if there is an arbitration agreement between the parties containing arbitration clause, the Civil Court ought to refer dispute to the arbitrator as envisaged under Sec.8 of the Act.

11. In the instant case, there is an arbitration clause between the parties, and as per Clause 16(a) of the Agreement, the dispute shall have to be referred to the arbitrator. A perusal of Clause 16(a) of the Agreement clearly shows that there is a recital in the agreement to refer the dispute with regard to the claims, cross-claims, counterclaims or set-offs arising out of or in relation to agreement to the sole arbitrator appointed by the plaintiff's company. Therefore, the principle laid down by the Supreme Court in Hindustan Petroleum Corporation Ltd., (supra) is squarely applicable to the facts of the instant case.

12. The defendant raised this plea before the learned trial Judge. However, the learned trial Judge did not consider this plea and adjudicate the application filed by the plaintiff seeking summons for judgment and application filed by the defendant seeking unconditional leave came

to be rejected. The learned trial Judge ought to have referred the dispute to the arbitrator in terms of Clause 16(a) of the Arbitration Agreement. Therefore, on this sole ground the impugned order deserves to be quashed and set aside. Hence, the learned trial Judge has committed jurisdictional error in passing the impugned order.

13. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned order dated 17.3.2006 recorded below application Exh.9 (summons for judgment) in Summary Suit No.1717 of 2003 by the learned Chamber Judge, Court No.14, City Civil Court, Ahmedabad is quashed and set aside. It is directed that the learned trial Judge shall refer the dispute with regard to claims, cross-claims, counterclaims or set offs between the parties in terms of Clause 16(a) of the Arbitration Agreement arrived at between the parties or allow the plaintiff to withdraw the suit for taking recourse to Clause 16(a) of the Arbitration Agreement.

14. Rule is made absolute to the aforesaid extent with no order as to costs. Direct service is permitted.

(A.M. Kapadia, J.)

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